Supreme Court, U.S.
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No. 90-8370

In The

Supreme Court of the United States

October Term, 1991

TEOFILO MEDINA, JR.,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court of California

BRIEF FOR PETITIONER

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QUESTION PRESENTED

After a doubt has been declared by a trial court as to the competence of a criminal defendant to stand trial, may a state, consistent with the due process clause of the Fourteenth Amendment, impose the burden of proof of incompetency upon the defendant whose competency is in issue, and impose an evidentiary presumption of competency in addition to imposing the burden of proof on the defendant, when: (1) the defendant's interest in not being tried while incompetent is fundamental; (2) the risk of an erroneous deprivation of the defendant's right, as a result of the placement of the burden of proof, is high, and is highest in situations where resolution of the question of the defendant's competence is medically difficult; (3) the placement on the state of the burden of proof as to the defendant's competence would entail no costs, or minimal additional costs, to the state; and (4) the defendant is treated, under state law, as incompetent during the proceedings to determine competence.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I IMPOSITION OF THE BURDEN OF PROVING INCOMPETENCE UPON THE DEFENDANT ABOUT WHOSE COMPETENCE A DOUBT HAS BEEN DECLARED IS IMPERMISSIBLE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 10

A. Imposing the Burden of Proof of Incompetence Upon the Defendant Violates the Due Process Test Enunciated in *Mathews v. Eldridge* 10

1. The Defendant's Interest in Being Tried Only if He Is Competent Is Fundamental 11

2. The Risk of An Erroneous Result Is Significant 15

(a) Reliance Upon Psychiatric Testimony Necessarily Entails A High Risk of Error 16

(b) Other Practical Factors Involved In the Competence Proceeding Increase the Risk of Error 18

TABLE OF CONTENTS – Continued

Page

(i) Confusion Resulting From the Case Specific Nature of the Competence Determination Increases The Risk of Error 18

(ii) The Effects of Any Mental Impairment From Which the Defendant Suffers Increase the Difficulty of Evaluation and Litigation of the Competence Issue 21

(iii) Reflexive Suspicion of Malingering In Evaluating Defendants With Mental Impairments Skews the Result of the Proceeding in Favor of Competence 23

(iv) The Instruction Injecting the Presumption of Competence Into The Jury's Deliberations Irrationally Increases the Risk of An Erroneous Finding 26

(c) Placing the Burden of Proving Competence Upon the Prosecution Would Significantly Decrease the Likelihood of An Erroneous Result 27

3. The Impact Upon the State's Interest of the Additional Protection Is Minimal ... 28

4. Conclusion 35

B. Imposing the Burden of Proving Incompetence Upon the Defendant Is Historically Unjustified, Not Widely Accepted, And Based Upon Analytical Confusion 36

TABLE OF CONTENTS – Continued

Page

C. Conclusion 45

II THE JURY INSTRUCTION IMPOSING A PRESUMPTION OF COMPETENCE, AFTER THE TRIAL COURT HAD DECLARED A DOUBT AS TO THE DEFENDANT'S COMPETENCE AND EVIDENCE IN SUPPORT OF INCOMPETENCE HAD BEEN PRESENTED, INJECTED AN IRRATIONAL ELEMENT INTO THE JURY'S DELIBERATIONS IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW..... 45

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Addington v. Texas
441 U.S. 418 (1979) 10, 16, 18, 36

Ake v. Oklahoma
470 U.S. 68 (1985) 14, 15, 17, 33

Alpine Forwarding Co. v. Pennsylvania R. Co.
60 F.2d 734 (2d Cir. 1932).....46, 47

Alvord v. Wainwright
725 F.2d 1282 (11th Cir. 1984)..... 13

Anderson v. Commonwealth
353 S.W.2d 381 (Ky. 1961) cert. denied, 369 U.S. 829 (1962)..... 14

Anderson v. Kentucky
376 U.S. 940 (1964) 13

Barber v. State
757 S.W.2d 359 (Tex.Crim. 1988) cert. denied, 489 U.S. 1091 (1989)..... 40

Buchanan v. Kentucky
483 U.S. 402 (1987) 32

Commonwealth v. Crowley
393 Mass. 393, 471 N.E.2d 353 (1984) 39

Cruzan v. Director, Missouri Department of Health
497 U.S. ___, 111 L.Ed.2d 224 (1990) 10, 15, 35

Darrow v. Gunn
594 F.2d 767 (9th Cir. 1979)..... 32

TABLE OF AUTHORITIES – Continued

Page

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263 Ark. 56, 562 S.W.2d 79 cert. denied, 439 U.S. 839 (1978) 40

Demosthenes v. Baal
495 U.S. ___, 109 L.Ed.2d 762 (1990) 13

Diaz v. State
508 A.2d 861 (Del. Super. 1986) 39

Drope v. Missouri
420 U.S. 162 (1975) 11, 12, 18, 28

Durden v. State
239 Ga. 697, 238 S.E.2d 334 (1977) 43

Dusky v. United States
362 U.S. 402 (1960) 12, 18

Dyson's Case, 1 Lewin. 64,
168 Eng.R. 960, 961 (1831) 37

Fallada v. Dugger
819 F.2d 1564 (11th Cir. 1987) 29

Faretta v. California
422 U.S. 806 12

Flowers v. State
353 So. 2d 1259 (Fla.App. 1978) 40

Ford v. Wainwright
477 U.S. 399 (1986) 15, 17

Foster v. Strickland
707 F.2d 1339 (11th Cir. 1983) 13

TABLE OF AUTHORITIES – Continued

Page

Francis v. Franklin
471 U.S. 307 (1985) 49

Griffin v. California
380 U.S. 609 (1965) 49

Hicks v. Feiock
485 U.S. 624 (1988) 46

Illinois v. Allen
397 U.S. 337 (1970) 12

In re Winship
397 U.S. 358 (1970) 42

Jackson v. Indiana
406 U.S. 715 (1972) 34, 41

Leland v. Oregon
343 U.S. 790 (1953) 36, 38, 44

Lenhard v. Wolff
443 U.S. 1306 stay den. 444 U.S. 807 (1979) 13

Ley's Case, 1 Lewin. 239,
168 Eng. Rpts. 1026 (1828) 37

Lincoln v. French
105 U.S. 614 (1882) 46

Loomer v. State
768 P.2d 1042 (Wyo. 1989) 39

Lowenfield v. Phelps
817 F.2d 285 (5th Cir. 1987) aff'd on other grounds 484 U.S. 231 (1988) 44

Lynch v. Overholser
369 U.S. 705 (1962) 34

TABLE OF AUTHORITIES – Continued

Page

Maggio v. Fulford
462 U.S. 111 (1983) 29

Manley v. Georgia
279 U.S. 1 (1929) 48

Martin v. Estelle
546 F.2d 177 (5th Cir. 1977) 14

Mathews v. Eldridge
424 U.S. 319 (1976) ..... *passim*

McCarlo v. State
677 P.2d 1268 (Alaska App. 1984) 39

McNeil v. Director, Patuxent Institution
407 U.S. 245 (1972) 22

Miller v. State
751 P.2d 773 (Okla.Crim. 1988) 40

Mobile J. & K.C.R. Co. v. Turnipseed
219 U.S. 35 (1910) 46

Mullaney v. Wilbur
421 U.S. 684 (1975) 35, 36

New York Life Insurance Co. v. Gamer
303 U.S. 161 (1938) 46

Ohio v. Akron Center for Reproductive Health
497 U.S. ___, 111 L.Ed.2d 405 (1990) 10

TABLE OF AUTHORITIES – Continued

Page

Parham v. J.R.
442 U.S. 584 (1979) 28

Pate v. Robinson
383 U.S. 375 (1976) 11, 13, 23, 28, 41

Patterson v. New York
432 U.S. 197 (1977) 35, 43, 44

People v. Bender
20 Ill. 2d 45, 169 N.E.2d 328 (1960) 23, 41

People v. Doom
48 Ill. App. 3d 959, 363 N.E.2d 457 (1977) 29

People v. Glover
257 Cal. App. 2d 502, 65 Cal. Rptr. 8 (1967) 45

People v. Hays
54 Cal. App. 3d 755, 126 Cal. Rptr. 770 (1976) 29

People v. Lawson
178 Cal. 722, 174 P. 885 (1918) 43

People v. Marks
45 Cal.3d 1335, 756 P.2d 260 (1988) 29

People v. McCullum
66 Ill. 2d 306, 362 N.E.2d 307 (1977) 41

People v. Medina
51 Cal. 3d 870, 799 P.2d 1282 (1990) 1, 40

People v. Mickle
54 Cal. 3d 140, 814 P.2d 290 (1991) 29, 32

People v. Murphy
72 Ill. 2d 421, 381 N.E.2d 677 (1978) 29

TABLE OF AUTHORITIES – Continued

Page

People v. Prince
203 Cal.App.3d 848, 250 Cal.Rptr. 154 (1988) 22

People v. Samuel
29 Cal. 3d 489, 629 P.2d 485 (1981)..... 23, 47, 48

People v. Santos
43 App. Div. 2d 73, 349 N.Y.S.2d 439 (1973)..... 39

People v. Stewart
89 Cal. App. 3d 992, 153 Cal. Rptr. 242 (1979) 29

People v. Vaughn
262 Cal. App. 2d 42, 68 Cal. Rptr. 366 (1968)..... 45

R. v. Davies
3 Car. & K. 328, 175 Eng. R. 575 (1853)..... 37

R. v. Podola
1 Q.B. 325 (1959) 3 All Eng.Rpts. 418 38

R. v. Sharp
[1958] 1 All Eng. Rpts. 62 37

R. v. Turton
6 Cox C.C. 385 (1854) 37

Rees v. Peyton
384 U.S. 312 (1966) 13

Rex v. Pritchard
7 Car. & P. 303, 173 Eng. R. 135 (1836)..... 37

Rivera v. State
351 A.2d 561 (Del.), appeal dismissed, 429 U.S. 877 (1976)..... 42

Sandstrom v. Montana
442 U.S. 510 (1979) 49

TABLE OF AUTHORITIES – Continued

Page

Santosky v. Kramer
455 U.S. 745 (1982) 10, 15, 35

Scott v. Burke
39 Cal. 2d 388, 247 P.2d 313 (1952)..... 48

Seidner v. United States
260 F.2d 732 (D.C. Cir. 1958)..... 14, 15, 21

Shephard v. Superior Court
180 Cal. App. 3d 23, 30 Cal.Rptr. (1986)..... 47

Solesbee v. Balkcom
339 U.S. 9 (1950) 12, 18

Speiser v. Randall
357 U.S. 513 (1958) 36, 41

State v. Aumann
265 N.W.2d 316 (Iowa 1978) 42, 43

State v. Bertrand
123 N.H. 719, 465 A.2d 912 (1983) 39, 41

State v. Chapman
104 N.M. 324, 721 P.2d 392 (1986)..... 40, 43

State v. Heger
326 N.W.2d 855 (N.D. 1982)..... 39

State v. Janice
20 Conn. App. 212, 565 A.2d 553 (1989)..... 29

State v. Jones
406 N.W.2d 366 (S.D. 1987) 39, 42

State v. Korell
213 Mont. 316, 690 P.2d 992 (1984)..... 14

TABLE OF AUTHORITIES – Continued

Page

State v. Ortega
77 N.M. 7, 419 P.2d 219 (1966) 43

State v. Pedersen
309 N.W.2d 490 (Iowa 1981) 40

State v. Rogers
419 So. 2d 840 (La. 1982) 40

State v. Searcy
118 Idaho 632, 798 P.2d 914 (1990) 14

State v. Weber
146 Wis. 2d 817, 433 N.W.2d 585 (App. 1988) 29

Sturgis v. Goldsmith
796 F.2d 1103 (9th Cir. 1986) 29

Taylor v. Kentucky
436 U.S. 478 (1978) 47

The Wildcroft
201 U.S. 378 (1906) 46

Thompson v. Blackburn
776 F.2d 118 (5th Cir. 1985) 29

Tot v. United States
319 U.S. 463 (1942) 48

Treece v. State
313 Md. 665, 547 A.2d 1054 (1988) 39

Trial of Charles Bateman
11 How. St. Trials 467 (1685) 12, 25

Ulster County v. Allen
442 U.S. 140 (1979) 46

TABLE OF AUTHORITIES – Continued

Page

Ungar v. Sarafite
376 U.S. 575 (1964) 35

United States ex rel. Bilyew v. Franzen
686 F.2d 1238 (7th Cir. 1982) 28

United States ex rel. S.E.C. v. Billingsley
766 F.2d 1015 (7th Cir. 1985) 28, 32

United States v. DiGilio
538 F.2d 972 (3d Cir. 1978) 11, 23, 41

United States v. Hendrix
542 F.2d 879 (2d Cir. 1976) 46

Usery v. Turner Elkhorn Mining Co.
428 U.S. 1 (1976) 48

Wallace v. Kemp
581 F.Supp. 1471 (M.D. Ga. 1984), rev'd on other grounds, 757 F.2d 1102 (11th Cir. 1985) 44

Wallace v. State
248 Ga. 255, 282 S.E.2d 325 cert. denied, 453 U.S. 927 (1981) 40, 43

Western & Atlantic R. Co. v. Henderson
279 U.S. 639 (1929) 49

Whitmore v. Arkansas
495 U.S. ___, 109 L.Ed.2d 135 (1990) 13

STATUTES AND RULES

28 U.S.C. § 1257(3) 1

Ala. Code § 15-16-21 (Michie 1986) 38

Ariz. R. Cr. Pro., Rule 11.1 (West 1987) 38

TABLE OF AUTHORITIES – Continued

Page

Cal. Evid. Code,
§ 45 48
§ 600 48
§ 802 32
§ 804 32
§ 1017 32
Cal. Pen. Code,
§ 187 2
§ 190.2, subd. (a)(17)(i and vii) 2
§ 190.2, subd. (a)(3) 2
§ 1368 2
§ 1369(f) 2, 40
Colo. Rev. Stat. Ann. § 16-8-111(2) (West 1986) 40
Conn. Gen. Stat. § 54-56d(b) (West 1989) 40
D.C. Code Ann. § 24-301 (Michie 1989) 38
Haw. Rev. Stat. § 704-405 (1985) 38
Idaho Code § 18-212 (1987) 38
Ill. Rev. Stat., ch. 38, ¶ 104-11(c) (Smith-Hurd 1977) 39
Ind. Code Ann. § 35-36-3-1 (West 1986) 38
Kan. Stat. Ann. § 22-3302 (1988) 38
Ky. Rev. Stats. Ann. §§ 504.100(3) (Michie 1990) 38
Me. Rev. Stat. Ann. tit. 15 § 101-B (West Supp. 1990) 38
Mich. Comp. Laws Ann. § 330.2020 (West 1980) 38

TABLE OF AUTHORITIES – Continued

Page

Minn. R. Crim. Pro., Rule 20 39
Miss. Code Ann. § 99-13-11 (1972) 38
Mo. Rev. Stat. § 552.020 (Vernon 1987) 39
Mont. Code Ann. § 46-14-221 (1989) 39
N.C. Gen. Stat. § 15A-1002 (1988) 39
N.J. Stat. Ann. § 2C:4-6 (West 1982) 39
Neb. Rev. Stat. Ann. § 29-1823 (1989) 39
Nev. Rev. Stat. Ann. § 178.415 (Michie 1986) 39
Ohio Rev. Code Ann. § 2945.37(A) (Anderson Supp. 1990) 39
Or. Rev. Stat. § 161.370 (1990) 39
Pa. Stat. Ann. tit. 50 § 7403(a) (Purdon 1969 and Supp. 1991) 40
R.I. Gen. Laws § 40.1-5.3-3(e) (Michie 1990) 39
S.C. Code Ann. § 44-23-430 (Law.Co.Op. 1976) 39
Tenn. Code Ann. § 33-7-301 (Michie 1984) 39
Utah Code Ann. § 77-15-5 (1990) 39
Va. Code Ann. § 19.2-169.1E (Michie 1990) 40
Vt. Stat. Ann. tit. 13 § 4817(b) (1974) 39
Wash. Rev. Code Ann. ch. 10.77.090(2) (West 1990) 39
W.Va. Code Ann § 27-6A(d) (Michie 1986) 39
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TABLE OF AUTHORITIES – Continued

Page

TEXTS AND OTHER AUTHORITIES

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Page

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Page

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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Petitioner TEOFILO MEDINA, JR., respectfully prays that this Court reverse the judgment of the Supreme Court of California affirming his conviction and sentence of death.[1]

OPINIONS BELOW

The opinion of the California Supreme Court is published as *People v. Medina*, 51 Cal.3d 870 (1990). JA 89. The order denying petitioner's timely petition for rehearing is unpublished. JA 164.

JURISDICTION

The judgment of the Supreme Court of California, affirming petitioner's conviction and sentence, was entered on November 19, 1990. A timely petition for rehearing was denied on February 14, 1991. On motion of petitioner, Justice O'Connor entered an order on May 6, 1991, extending the time for the filing of a petition for certiorari until June 14, 1991, and on June 14, 1991, the petition for certiorari was filed. This Court granted the petition on October 21, 1991, limited to one issue presented in the petition. JA 165. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any

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[1] There are no parties to this proceeding other than those stated in the caption.

person within its jurisdiction the equal protection of the laws."

California Penal Code section 1369 provides, in pertinent part:

> "A trial by court or jury of the question of mental competence shall proceed in the following order:
>
> * * *
>
> "(f) In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous."

STATEMENT OF THE CASE

Petitioner Medina was charged with committing three murders with special circumstances, Cal. Pen. Code, §§ 187, 190.2, subd. (a)(17)(i and vii), (a)(3), and with other offenses. CT 1.[2] Before trial, on motion of the defense and without objection from the prosecution, the trial court declared a doubt as to the defendant's competence to stand trial, suspended the criminal proceedings, and instituted proceedings under California Penal Code section 1368 to try the issue of competence to a jury. CT 419.

Petitioner Medina had been examined by Drs. Gold, Pierce, Sharma, and Sakurai, and Mr. Miller, a mental health specialist, and all had different opinions of the degree and character of his mental impairment. Dr. Gold,

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[2] CT and RT refer to the clerk's and reporter's transcripts in the automatic appeal in the California Supreme Court, and JA refers to the Joint Appendix.

who was then Chief Psychiatric Consultant to the Arizona Department of Corrections, had treated Medina for over a year at the Arizona State Prison, from 1977 to 1979. During that time, Dr. Gold saw Medina every one or two weeks, and he examined Medina again just before the competency hearing. JA 26-28.

Dr. Gold diagnosed Medina as a chronic paranoid schizophrenic. He was not competent because he was not aware of the charges against him, and he suffered from psychotic denial: in that condition events other than those which the patient obsessively focuses on simply do not exist. JA 22, 27-29, 30. "Schizophrenics have a very active fantasy life and at times when they are psychotic, it is difficult to differentiate between what is fantasy and what is real. . . . [t]his is just part of the jungle that they live in. It is their day-to-day life." JA 24. Dr. Gold considered Medina's history of self-mutilation consistent with his schizophrenia, since an imprisoned schizophrenic will vent his "anger and rage" upon himself: "He becomes his own target." JA 25-26. Schizophrenia normally does not go into remission without medication and treatment, and Medina's condition was not in remission. JA 24-25.

Dr. Gold believed that a desire on an inmate's part for a change of housing, or manipulative behavior, does not necessarily suggest malingering, since on some subjects schizophrenics can plan and act rationally. JA 35-36. Medina's escape attempt in Arizona was also consistent with paranoid schizophrenia, since confined individuals with that condition "feel justified in obtaining their freedom. They are being held illegally to begin with." JA 35.

Dr. David Pierce, a psychologist appointed by the court, interviewed Medina six times and performed some testing in the jail. He also diagnosed Medina as paranoid schizophrenic. JA 61, 71. The results of the testing were similar to those of paranoid schizophrenics, and some responses were associated with aggression and hostility. Dr. Pierce believed that Medina had problems with memory (one of his tests scored him in the lowest 5% of the population on "logical memory"), but that this was not

indicative of malingering since Medina failed to remember things when there was no gain in not remembering. JA 63-64; RT 603-605. Dr. Pierce did not think Medina was malingering or being deliberately uncooperative, JA 53-55, and the manner of his inattentiveness at times suggested that he was hallucinating. JA 62. Medina's history included reports that he heard voices, including that of his dead brother, and that he had seen Christ and St. John. JA 70.

Dr. Pierce nevertheless believed Medina was competent, because he understood the charges and the "roles" of people in the courtroom. JA 72-73. He believed Medina would cooperate with his lawyers "to the extent that he is able" JA 68, although he did not explain how Medina's failures of memory and delusions were consistent with his rational participation in his defense. Dr. Pierce believed that most schizophrenics were competent to stand trial. JA 68-69.

Dr. David Echeandia, an Orange County jail psychologist, had talked to Medina five or six times in the course of his work at the jail. He thought Medina was a "puzzle diagnostically", showing signs suggestive of schizophrenia, of schizotypal personality disorder, and of depression. JA 42. Dr. Echeandia's current diagnosis was of borderline personality disorder with some antisocial features, but schizophrenia remained a possible diagnosis. JA 43, 46. Medina's condition was not primarily psychotic, but Dr. Echeandia observed periods in which Medina's behavior suggested "impairment of reality testing," when he would be doing something "suggestive of a loss of contact with reality." JA 17. He was sometimes agitated, disoriented and confused, had memory problems, and was uncommunicative, in addition to being "very unstable" violent, aggressive and manipulative, JA 19-20, but Dr. Echeandia did not think malingering could account for all of Medina's symptoms. JA 43. Medina had told him that he was afraid of being killed in jail, and that

he had heard his dead mother's voice. He had not examined Medina on the issue of competence and did not have an opinion on the issue. JA 44.

Dr. Kaushal Sharma, a psychiatrist appointed by the court to examine Medina, believed that he had some mental impairment. JA 55. He believed that Medina was malingering, however, and that he was able to cooperate with his attorneys if he chose to, although he conceded that it was possible Medina had no control over his failure to cooperate. JA 50, 53-54. Dr. Sharma agreed with one of the doctors who treated Medina in Arizona, who diagnosed him as paranoid schizophrenic, but in remission, and thought that Dr. Gold's observations were consistent with the condition being in remission. JA 51.

Dr. Sharma saw Medina once or twice in 1985, before he was stabbed in the jail, and once in 1986, shortly before the competency proceeding. In the latter interview, Medina was uncooperative, saying that he was "paranoid" and could not talk to Dr. Sharma. After about twenty minutes, Medina lunged at, and cracked, the glass separating them in the interview booth. JA 52; RT 510-511.

Dr. Sharma believed that Medina's insistence on his "paranoia" was inconsistent with true pathology, but he conceded that Medina could have been using the term in the lay sense to indicate fear as a result of his near-fatal stabbing. He also acknowledged that Medina's references to the existence of his mental illness could have been influenced by the fact that he was being medicated by the jail mental health professionals for mental illness. JA 52-53. Despite Medina's uncooperativeness, Dr. Sharma still felt able to make a diagnosis, although he agreed that Dr. Gold, who had treated Medina over a long period of time, would be in a better position to do so. JA 48-49, 55.

Robert Miller was a mental health specialist with an undergraduate degree who had done some graduate work in psychology, and who worked for the Orange

County Jail. JA 56-57. He made an initial working diagnosis of Medina as suffering from paranoid schizophrenia, or possible bipolar disorder with psychotic features, based on a forty-minute interview and some psychiatric history information, including a history of receiving psychiatric medication in Vacaville in 1972 and in the Arizona State Prison. JA 57-58. Miller later changed his opinion, after receiving uncorroborated information from an unidentified source in Arizona that Medina had not received medications or psychiatric treatment, and after observation of Medina's behavior for two to three weeks, to a diagnosis of antisocial personality disorder and malingering. JA 57-60.

Dr. George Sakurai, the Orange County jail psychiatrist, had seen Medina approximately eight or ten times in the course of his duties in the jail. He did not form an opinion about Medina's competence, since he had never examined him for that purpose. He did not think his rational discussions with Medina on other subjects necessarily implied he was competent. JA 9. Dr. Sakurai thought Medina's main problem was depression, and Medina was being given anti-depressant medication. JA 9-10; RT 231. He did not think Medina was psychotic or schizophrenic but he did think he was malingering. Dr. Sakurai testified that he did not think Medina's suicide attempts were faked, although he did not know whether Medina actually intended to kill himself; later Dr. Sakurai testified that he thought some of Medina's self-inflicted wounds were attempts at manipulation, as were his "outbursts" in jail. RT 750.

The testimony of lay witnesses was similarly diverse. David Sandberg, the defense investigator, talked to Medina in jail more than twenty times since taking the case in 1984 but Medina had never been able to have a conversation with him relevant to the charged offenses. JA 83. Sylvia Ayala, one of Medina's sisters with whom he lived when he returned from Arizona, thought he was "mentally ill." She observed him often watching television with the sound off and the radio on; he would

"mumble a lot and talk to himself." He was like "two persons in one": he did not make sense, and often forgot things; he was restless but stayed inside with the windows and shades closed and complained about being spied on. He told her he did not remember anything about the charged offenses. JA 11-14. Irene McIntosh, Medina's other sister, "knew there was something wrong with him" when he returned from Arizona. She and her family were not afraid of him, however. When she visited him in jail he would talk obsessively about items he needed but said he did not remember anything about the offenses. JA 15; RT 308.

Richard Negrete, Medina's former parole officer, had contact with him in 1984, before his arrest, two years before the competency hearing. He did not act "bizarre" and did not have trouble communicating. JA 77. J.D. Green, a sergeant in the jail responsible for classification and discipline, had talked to Medina once about his housing situation after Medina was stabbed. Green believed Medina understood everything they discussed and found him responsive to his questions. JA 79-80. Medina had been in and out of the administrative segregation section, the disciplinary isolation area, and the medical observation cell, as a result of various disciplinary offenses and explosive outbursts. RT 679-680, 682-685.

At the close of the competency hearing, the court instructed the jury that the defendant was presumed to be competent and that the burden of proof to show incompetence was on the defense; and the prosecutor emphasized the burden of proof and the presumption in his closing argument. JA 69-80. The jury returned a verdict finding the defendant competent. JA 88. Petitioner was later found guilty of all the charged offenses and was sentenced to death. CT 1346.

On automatic appeal, the California Supreme Court rejected petitioner's argument that the imposition of the burden of proof on the defendant, and the giving of a jury instruction on the presumption of competency after a

doubt had been found by the trial court as to the defendant's competency, violated due process. JA 93-101. Two justices dissented from this holding. JA 146, 149. This Court granted certiorari. JA 165.

Petitioner now requests that this Court apply its due process precedents to this issue and hold that the imposition of the burden of proof upon the defendant, and the instruction on the presumption of competence after a doubt as to competence has been declared, are constitutionally impermissible.

SUMMARY OF ARGUMENT

Imposition of the burden of proof of incompetence upon a criminal defendant violates due process under the balancing test prescribed by *Mathews v. Eldridge*, 424 U.S. 319 (1976). First, the defendant's right not to be tried while incompetent is plainly fundamental; and the state shares an interest in maintaining the integrity of the trial process, which is severely compromised when an incompetent defendant is forced to stand trial. Second, the risk of error is high: competency determinations are made almost entirely on the basis of psychiatric expert testimony; and the inexact nature of that science leaves significant room for doubt as to the accuracy of any result. In addition, empirical data suggest that expert competency evaluations tend to be skewed in favor of finding competency; and, in the competency proceeding, the jury is instructed, not only on the burden of proof, but also that the defendant is presumed to be mentally competent, further skewing the jury's determination of the issue in favor of finding competence. Imposition of the burden of proof upon the state would compensate for this bias in favor of finding competency and would ensure that, in close cases where the allocation of the burden of proof is likely to be outcome-determinative, defendants who are actually incompetent would not bear the risk of being forced to stand trial as a result of an erroneous finding of competency. Third, the cost to the state of bearing the

burden of proof on competency would be minimal. The number of cases in which the issue of competency arises at all is not substantial, and the number of those cases that require contested hearings is extremely small. The evidence relevant to the competency determination is as available to the prosecution as to the defense, and thus preparation for carrying the burden of proof would not impose significant costs upon the state which it does not already have to bear. Further, any interference with the state's interest in proceeding with the criminal prosecution is minimal, since defendants who are committed to psychiatric facilities but who are in fact competent are diagnosed and returned to court in an expeditious fashion.

Other considerations bearing on the due process analysis also favor placing the burden of proof on the prosecution. The common-law rule in effect at the time the Constitution was adopted appears to have placed the burden on the state. Further, the state jurisdictions which impose the burden on the defendant are clearly in a minority. The jurisdictions which have placed the burden on the defendant, either by statute or by decisional law, have done so primarily under the influence of a false analogy to the burden of proof of insanity at the time of the offense, which invokes entirely different considerations in the due process analysis.

Finally, the California jury instruction, imposing an evidentiary presumption of competence in addition to placing the burden of proof on the defendant, irrationally skews the jury's determination in favor of a finding of competence. The presumption is irrational in the context of the competency proceeding, since under state law a hearing on competency occurs only after the court, by expressing a doubt as to competence, impliedly finds facts supporting a prima facie showing of incompetence. Assuming arguendo that the imposition of the burden of proof on the defendant is constitutionally permissible, the treatment of the presumption as evidence in the jury's

deliberations injects an entirely arbitrary and therefore unconstitutional element into the proceedings.

ARGUMENT

I

IMPOSITION OF THE BURDEN OF PROVING INCOMPETENCE UPON THE DEFENDANT ABOUT WHOSE COMPETENCE A DOUBT HAS BEEN DECLARED IS IMPERMISSIBLE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. Imposing the Burden of Proof of Incompetence Upon the Defendant Violates the Due Process Test Enunciated in *Mathews v. Eldridge*

Whether a particular procedural protection is mandated by the due process clause of the Fourteenth Amendment involves application of a balancing test:

> " . . . identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

This test has consistently been used to analyze issues as to the allocation and degree of the burden of proof. E.g., *Cruzan v. Director, Missouri Department of Health*, 497 U.S. ___, 111 L.Ed.2d 224, 244 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. ___, 111 L.Ed.2d 405 (1990); *Addington v. Texas*, 441 U.S. 418 (1979); *Santosky v. Kramer*, 455 U.S. 745, (1982). Application of the *Mathews* test to the issue presented in this case compels the conclusion that

imposing the burden of proof of incompetence upon the defendant whose competence is in question violates the due process clause.[3]

1. The Defendant's Interest in Being Tried Only if He Is Competent Is Fundamental

There can be no doubt that trial of an incompetent defendant violates the constitutional guarantee of due process of law. *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975); *Pate v. Robinson*, 383 U.S. 375 (1976); *Dusky v. United States*, 362 U.S. 402 (1960). The requirement that the defendant be competent in order to stand trial is "fundamental to an adversary system of justice." *Drope v.*

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[3] The issue can also be characterized as whether there must be an affirmative showing that the defendant is competent. There is a body of opinion which rejects the idea that allocating the burden of proof is relevant in a competency proceeding, but instead focuses upon the duty of the court to make an affirmative finding that the defendant is competent before permitting the criminal prosecution to proceed. *See* ABA, *Criminal Justice Mental Health Standards* § 7-4.8(c)(ii) at 214, 232 (1989); Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence To Stand Trial*, 53 Geo. Wash.L.Rev. 375, 398-399 (1985); Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U.Chi.L.Rev. 21, 57, 64-66 (1977). The theory of this position is that when it is as likely that the defendant is incompetent as competent-that is, when the evidence is in equipoise – the defendant has not been affirmatively shown to be competent and trial should not proceed. *See United States v. DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976), cert. denied sub nom. *Lupo v. United States*, 429 U.S. 1038 (1976). The California statute at issue permits a defendant to be tried when the evidence is in equipoise.

Petitioner's argument here, that he cannot be made to carry the burden of proving incompetence and that the prosecution should have the burden of proving his competence, subsumes that position.

Missouri, supra, 420 U.S. at 172 (citation omitted). Ensuring that a defendant has "a rational as well as factual understanding of the proceeding against him," *Dusky v. United States,* 362 U.S. at 402, protects the accuracy of the trial result, and recognizes the value the society places upon personal dignity and autonomy, by preventing the spectacle of a criminal trial in which the person most concerned is unable to participate. *E.g.,* Note, *Incompetency To Stand Trial,* 81 Harv.L.Rev. 454, 458 (1967).

Plainly, the outcome of a trial in which the defendant plays no part cannot be considered accurate, and an incompetent cannot conduct a defense either alone or through counsel: "[T]he true reason of the law I think to be this, a person of 'non sana memoria,' and a lunatick during his lunacy, is . . . disabled to make his just defence. There may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defense. . . . " *Trial of Charles Bateman,* 11 How. St. Trials 467, 475 (1685); *Solesbee v. Balkcom,* 339 U.S. 9, 18 (1950) (Frankfurter, J., dissenting); 4 W. Blackstone, *Commentaries,* * 24 (1769).

Irrespective of its effect upon the accuracy of the factfinding in the proceeding, the requirement that the defendant be competent ensures that the defendant's strategic choices, which make the defense case the product of the defendant's own will, can be "honored out of 'that respect for the individual which is the lifeblood of the law.' " *Faretta v. California,* 422 U.S. 806, 834, quoting *Illinois v. Allen,* 397 U.S. 337, 350-351 (1970) (Brennan, J., concurring).

The precedents requiring respect for this dignitary interest condition the right of parties to make fundamental decisions upon their competence to do so. In *Faretta v. California, supra,* 422 at 835, the Court recognized a constitutional right to self-representation in criminal cases, explicitly based upon the defendant's competent, even if

unwise, choice to forego representation by counsel. In *Demosthenes v. Baal,* 495 U.S. ___, 109 L.Ed.2d 762, 767-768 (1990), and *Whitmore v. Arkansas,* 495 U.S. ___, 109 L.Ed.2d 135, 151-152 (1990), this Court recognized a defendant's personal right to waive appellate and other post-conviction review, and thus to be executed without exhausting all available avenues of redress, again based upon the defendant's competent choice. *See also Lenhard v. Wolff,* 443 U.S. 1306, 1311-1312 (Rehnquist, J., in chambers), stay denied 444 U.S. 807 (1979). Authorities recognizing the principle that a defendant must be competent in order to control the litigation of his case are legion. *E.g., Alvord v. Wainwright,* 725 F.2d 1282, 1289 (11th Cir. 1984) (counsel ethically obligated to follow competent client's direction not to raise insanity defense); *Foster v. Strickland,* 707 F.2d 1339, 1343-1344 (11th Cir. 1983) (same).

The corollary of the right of a competent party to control the strategic direction of the litigation is the equally fundamental right of a party not to be bound by proceedings in which he cannot rationally participate. In *Pate* itself, this Court held that a defendant about whose competence a question had been raised could not waive the right to a judicial determination of his competence. *Pate v. Robinson, supra,* 383 U.S. at 384. This Court has recognized the same principle, that a defendant's competence is a necessary condition of any proceeding in which substantial rights may be litigated, in other contexts as well. In *Rees v. Peyton,* 384 U.S. 312 (1966), this Court remanded the case for a hearing on the petitioner's competence, and took no action on the petitioner's motion to withdraw a pending petition for certiorari, when counsel expressed a doubt as to his client's competence. In *Anderson v. Kentucky,* 376 U.S. 940 (1964), the Court, upon agreement by the parties, ordered the matter "continued indefinitely," after granting certiorari: in that case, a defendant suffered from the delusion that the General

Electric Company, as well as the judges who had participated in his case, and various other public officials, were engaged in a conspiracy against him. *Anderson v. Comm.*, 353 S.W.2d 381 (Ky. 1961), cert. denied 369 U.S. 829 (1962) and 369 U.S. 863 (1962), cert. granted 371 U.S. 886 (1962); *see also, Martin v. Estelle*, 546 F.2d 177, 180 (5th Cir. 1977) (procedural rights useless if defendant is not competent); *Seidner v. United States*, 260 F.2d 732, 734 (D.C. Cir. 1958) (incompetent party not "master of his own pleadings").

Thus there can be no doubt that the defendant's interest which is affected by the issue of the burden of proof is a fundamental one.[4] How the violation of this fundamental right may affect the proceedings is demonstrated in this case by the defendant's irrational insistence upon the reentry of a plea of not guilty by reason of insanity. Before trial, defense counsel had the defendant examined to determine if such a plea should be entered, but indicated to the court that the defendant himself was likely to oppose its entry. CT 35. Later, a not guilty by reason of insanity plea was entered by the defendant, but at the conclusion of the guilt phase of trial, after an extensive canvass by the court, the defendant withdrew the plea. RT 5875-5876, 5881-5885, 5897-5898. Two days later, however, the defendant insisted upon reentering the insanity plea. RT 5991, 5995-6002. Despite the vehement objections of defense counsel that putting on a fruitless sanity phase would "destroy" the effect of the case in mitigation in the penalty phase (with which the trial court agreed, RT 5993), the defendant maintained that he

[4] In contrast, the availability under state law of affirmative defenses which completely exonerate the defendant of criminal liability may not be constitutionally required, and therefore the due process analysis of the burden of proof on those issues is likely to be different from that presented here. *See State v. Searcy*, 118 Idaho 632, 636, 798 P.2d 914 (1990); *State v. Korell*, 213 Mont. 316, 690 P.2d 992 (1984); *Ake v. Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting).

wanted to go through with the sanity phase. The trial court and defense counsel, believing that they had no option but to accede to the defendant's irrational desire, allowed the reentry of the plea of not guilty by reason of insanity, RT 5993, 5995, 6003; on appeal, the California Supreme Court held that the trial court and counsel were absolutely required to accept the defendant's entry of the plea. JA 123-125. Absent an adequate finding that the defendant was, in fact, competent, the trial court's action in acceding to his irrational wish to reenter the insanity plea, and the upholding of that action on appeal, corrupted the factfinding process. While that corruption is not irreversible in the same sense as a withdrawal of life support, *Cruzan v. Director, Missouri Health Dept., supra*, 111 L.Ed.2d at 245, it is devastating to the reliability of the factfinding in the criminal proceedings, *see Santosky v. Kramer, supra*, 455 U.S. at 759, and here, the result of the criminal proceeding was a death sentence. The defendant's interest in not being forced to stand trial while he is incompetent is plainly fundamental. Trying an incompetent defendant both deprives him of the ability to contribute to the reliability of the proceedings by participating rationally in them, and enforces against him strategic choices made while he is not rational. *See Seidner v. United States, supra*, 260 F.2d at 734.

2. The Risk of An Erroneous Result Is Significant

The second factor in the *Mathews* analysis is consideration of the risk of error in the determination, and of how the procedure in issue would increase the reliability of the determination. The consequences of an erroneous determination assume particular force here, because this is a capital case: "In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases." *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring). Thus a "heightened concern for fairness and accuracy," *Ford v. Wainwright*, 477 U.S. 399, 411 (1986), should be applied to the

analysis, since the result of the competency proceeding will determine whether an arguably incompetent defendant will be put on trial for his life.

(a) Reliance Upon Psychiatric Testimony Necessarily Entails A High Risk of Error

The issue presented in a competency proceeding involves scrutiny of the effect of the defendant's mental illness upon his ability to participate in the criminal proceedings, and that inquiry entails the use of psychiatric testimony. As this Court has recognized, there is always a substantial risk of error in a determination which depends upon psychiatric expert testimony.

In *Addington v. Texas*, 441 U.S. 418 (1979), this Court rejected an argument that proof beyond a reasonable doubt of an individual's mental illness and dangerousness should be required to justify civil commitment, relying explicitly upon the uncertainty of psychiatric diagnosis.

> "Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.
>
> * * *
>
> "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician."

Id. at 429-430. Accordingly, the Court imposed the burden of proof by clear and convincing evidence as a "compromise" between "what is possible to prove and what protects the rights of the individual." *Id.* at 430.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Court again recognized the uncertainty of psychiatric diagnosis:

> "Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. . . . By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them."

Id. at 81 (footnote omitted). The Court concluded, because of the crucial role played by psychiatric testimony in the defense of insanity and the uncertainty of psychiatric diagnoses, that a defendant had a due process right to the assistance of a psychiatrist in order to litigate the issue adequately.

Again, in *Ford v. Wainwright*, 477 U.S. 399 (1986), in considering the adequacy of state procedures to determine if a convicted defendant is competent to be executed, the Court recognized the "particularly acute need for guarding against error [which] inheres in a determination that 'in the present state of the mental sciences

is at best a hazardous guess however conscientious.' " *Id.*, at 412, quoting *Solesbee v. Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting).

As these authorities demonstrate, this Court consistently views determinations based upon psychiatric evidence as carrying a high risk of error. The psychiatric testimony in this case was entirely consistent with this view, since on the basis of similar information about the defendant the experts came to radically different conclusions as to "the meaning of the facts." *Addington v. Texas, supra*, 441 U.S. at 429. Under the *Mathews* test, this factor supports the necessity of protecting against the erroneous deprivation of the defendant's fundamental right to be tried only if he is competent, by imposing the burden of proof of competence on the prosecution.

(b) Other Practical Factors Involved In the Competence Proceeding Increase the Risk of Error

As a practical matter, the risk of error in the competency proceeding is in fact far greater than the reliance upon psychiatric testimony suggests. Several factors contribute to this increased risk.

(i) Confusion Resulting From the Case Specific Nature of the Competence Determination Increases The Risk of Error

The assessment of competence to stand trial is a complicated issue, which does not "turn on the finding of a single fact. . . . " *Id.* at 412. The content of the constitutional standard of competence – that the defendant be able "to assist in preparing his defense," *Drope v. Missouri*, 420 U.S. at 171, "to consult with his lawyer with a reasonable degree of rational understanding" and to have "a rational as well as factual understanding of the proceedings against him," *Dusky v. United States*, 362 U.S. at

402 – is dependent upon the complexity of the issues involved in the case and the character of the strategic decisions with which the defendant will be faced. *See* Silten and Tullis, *Mental Competency In Criminal Proceedings*, 28 Hastings L.J. 1053, 1062-1063 (1977). It is universally accepted that the assessment of competence must focus upon the specific demands of the defendant's case. *E.g.*, ABA, *Criminal Justice Mental Health Standards* 173-175 (1989); A. Stone, *Mental Health And Law: A System In Transition* (1975); T. Grisso, *Evaluating Competencies – Forensic Assessments and Instruments* 112 (1986); R. Roesch and S. Golding, *Competency To Stand Trial*, 13-14, 19-24, 33-36, 82-91 (1980); Robey, *Criteria for Competency To Stand Trial: A Checklist for Psychiatrists*, 122 Am.J. Psychiatry 616, 619-620 (1965); Miller and Germain, *The Specificity of Evaluations of Competency To Proceed*, 14 J. Psychiatry and Law 333, 336-337, 344 (1986).

But evidence suggests that lawyers and mental health professionals often do not have an accurate understanding of the standard of competency and do not consistently make an adequate assessment with reference to the specific facts of the defendant's case. R. Roesch and S. Golding, *Competency To Stand Trial* 50, 83-88 (1980); Grisso and Seigel, *Assessment of Competency To Stand Criminal Trial*, in W. Curran, A. McGarry and S. Shah, *Forensic Psychiatry and Psychology: Perspectives and Standards for Interdisciplinary Practice* 153 (1986); Rosenberg and McGarry, *Competency for Trial: The Making of An Expert*, 128 Am.J.Psychiatry 82 (1972); A. Matthews, *Mental Disability and the Criminal Law* 46 (1970) This case itself provides examples of the problem. In closing argument, the prosecutor claimed that a defendant has to be "almost a vegetable" before he can be found incompetent, and told the jury to look at the defendant, that "he's not a vegetable . . . he's not drooling at the mouth" JA 85; RT

865. This argument may have been only misleading rhetorical excess; but to the extent that it reflected the prosecutor's actual view of the standard of competency, it certainly supports the position in the literature that the standard of competence is poorly understood.

Dr. Pierce's testimony also demonstrates the problem. He testified that the defendant suffered from paranoid schizophrenia, had impaired memory, and periodically hallucinated and lost contact with reality, but that he was competent to stand trial. JA 61-71. When pressed about how the defendant could work with his lawyers if he could not remember the charged offenses, Dr. Pierce indicated only that the defendant would cooperate with counsel "to the extent that he is able." JA 67-68. In discussing the extent of the defendant's knowledge of the nature of the proceedings, Dr. Pierce recounted, under cross-examination by the prosecutor, that the defendant said that the goal of the prosecutor was "to find you guilty and to 'screw you,' " JA 73, which the prosecutor characterized as "a pretty good understanding of what's going on." *Id.* In none of his testimony was Dr. Pierce asked to relate any feature of the defendant's psychotic condition, other than his impaired memory, to any of the specific issues at trial or to any of the strategic decisions likely to arise in a capital prosecution, such as the entry of the plea of not guilty by reason of insanity. Thus despite Dr. Pierce's claim that he was familiar with the competency standards, JA 65, his testimony gave little guidance to the factfinder as to how petitioner's mental disorder actually affected his ability to deal rationally with the proceedings. In the absence of such particularized guidance, the jury was left simply to rely upon his ultimate conclusion that the defendant was competent; and that conclusion appears to be inconsistent with his description of the defendant's mental state. Because the competency determination is so thoroughly dominated by psychiatric expert testimony, the existence

of widespread confusion among mental health professionals as to the applicable standards greatly increases the risk of error in the proceeding.

(ii) The Effects of Any Mental Impairment From Which the Defendant Suffers Increase the Difficulty of Evaluation and Litigation of the Competence Issue

The risk of error is further complicated by the fact that behaviors which make evaluation of a defendant or litigation of the issues more difficult may themselves be symptoms of mental impairment: "incompetent subjects are generally more disturbed and agitated than the competent individuals [and] markedly more confused and suspicious. . . . " Maxon and Neuringer, *Evaluating Legal Competency*, 117 J. Genetic Psychology 267, 272 (1970); D. Shapiro, *Psychological Evaluation and Expert Testimony: A Practical Guide To Forensic Work* 4-9 (1984); Rogers, *Development of A New Classificatory Model of Malingering*, 18 Bull.Am.Acad. Psychiatry L. 323, 325 (1990) (uncooperativeness more characteristic of chronic psychiatric patients than malingerers); Herron, Zonana and Crane, *Competence To Stand Trial In Connecticut*, 11 Bull. Am.Acad. Psychiatry L. 261, 269 (1983) (interdisciplinary approach to patient evaluation difficult when patient paranoid and has difficulty talking even to one interviewer); *see* 2 ALI, Model Penal Code and Commentaries (Official Draft and Revised Comments) § 4.05(3), 233, 239 (1985) (evaluation report should indicate if unwillingness to participate in proceedings is itself result of mental disease); *see also Seidner v. United States, supra*, 260 F.2d at 734 (defendant's delusional belief in own competence). Behaviors characteristic of schizophrenics – for instance, agitation, impulsivity, uncooperativeness, delusions and failure of memory, *see* 1 H. Kaplan and B. Sadok, *Comprehensive Textbook of Psychiatry*, 759-760, 765 (5th ed. 1989) –

not only make evaluation more difficult, but they are likely to be misinterpreted, particularly by lay jurors. Genuine symptoms may, as here, be viewed as showing that the individual is "cantankerous," JA 34, or "more mean than anything else" JA 11.

Similarly, a defendant's inability to control himself during the proceedings may be a product of his mental illness, *see* D. Shapiro, *Psychological Evaluation and Expert Testimony* at 5, but it may be interpreted as being merely manipulative behavior, and therefore as evidence of competence. For instance, here the defendant overturned counsel table during the competency proceeding. JA 81-82.[5] Although Dr. Sakurai, who was on the witness stand when it happened, could not give an opinion as to what caused this incident, RT 751, the prosecutor claimed that it was a purely manipulative act and urged the jury to view it as such. RT 750, 863-864.[6] The defendant's inability to control his behavior or his failure to cooperate in a mental examination may itself be a "manifestation of mental illness, for which he cannot fairly be held responsible." *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 246 (1972) (citation omitted). But practically, the difficulty of interpreting that behavior greatly increases the risk of an erroneous determination of competence, simply because of the effect of the defendant's mental impairment.

The difficulty of a defendant's situation in litigating the issue of competence when he may not even be in control of himself underlies the seminal decision on the burden of proof issue:

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[5] Other verbal and physical outbursts occurred during the competency proceedings and the trial. JA 62, RT 15, 36-38, 671, 699, 916.

[6] The defendant's demeanor can be considered by the jury as evidence in a competency proceeding. *E.g., People v. Prince*, 203 Cal.3d 848, 855-856, 250 Cal.Rptr. 154 (1988).

> "Let us assume that defendant is in fact unable to cooperate with counsel and present his case in a rational manner. It would be a strange rule, indeed, to impose upon him the burden of proving his own incompetence, for the very disability which he would be seeking to prove renders him incapable, either logically or legally, of sustaining the burden of proof."

People v. Bender, 20 Ill.2d 45, 169 N.E.2d 328, 332 (1960); accord, *United States v. DiGilio*, 538 F.2d at 988.

As a practical matter, California law recognizes this problem; and it resolves it by treating the defendant as incompetent for the purpose of the hearing, in flat defiance of the presumption of competency which it simultaneously imposes. The defendant is prevented from making decisions normally reserved to a party explicitly on the ground that such decisions cannot be left to the defendant's apparently "defective judgment." *People v. Samuel*, 19 Cal.3d 489, 495-496, 629 P.2d 485 (1981); *see Pate v. Robinson, supra*, 383 U.S. at 384. "In short, the state has placed on the defendant the burden of proving a fact that, if true, may be very difficult for the defendant to prove." Note, *Should the Burden of Proving Incompetence Rest on the Incompetent?* 64 Iowa L.Rev. 984, 991 (1979). The existence of any mental impairment thus contributes significantly to the risk of error.

(iii) Reflexive Suspicion of Malingering In Evaluating Defendants With Mental Impairments Skews the Results of the Proceeding in Favor of Competence

A related factor increasing the risk of an erroneous outcome is the focus on malingering: the obsession with that issue in the literature on competency suggests a high level of institutional skepticism about any claim of mental illness made by or on behalf of criminal defendants.

Whenever litigation of any sort is involved, "the psychiatrist needs to shift his attitude from not only believing everything the patient says, but to suspecting malingering as well." Ziskin, *Malingering of Psychological Disorders*, 2 Behavioral Sci. L. 39, 40 (1984); Resnick, *The Detection of Malingered Mental Illness*, 2 Behavioral Sci. and the Law 21, 28 (1984) ("above all, malingering must be suspected" in criminal defendants); Resnick, *Malingered Psychosis* in Rogers, ed., *Clinical Assessment of Malingering And Deception* 48-52 (1988); *see* Daniel and Resnick, *Mutism, Malingering, and Competency to Stand Trial*, 15 Bull.Am.Acad. Psychiatry and Law 301, 308 (1987) ("high index of suspicion" of mute defendants).

In turn, any suggestion of exaggeration of symptoms tempts the expert to over-identify competency. Drob, Berger and Weinstein, *Competency to Stand Trial: A Conceptual Model for Its Proper Assessment*, 15 Bull.Am.Acad. Psychiatry and Law 85, 92 (1987); *see also* Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal.L.Rev. 693, 735-736 (1974) (mental health professionals almost always resolve doubtful qūestions to patient's disadvantage). Resnick, *Malingered Psychosis*, in R. Rogers, ed., *Clinical Assessment of Malingering and Deception*, *supra*, at 49 (when condition shows mixture of schizophrenic and antisocial features, mental health professionals may focus only on antisocial traits); Rogers, *Towards An Empirical Model of Malingering and Deception*, 2 Beh.Sci.L. 93, 99 (1984) (elevation of one scale on MMPI test may identify malingering but also identifies psychosis and behavioral disorders.) One small-scale study showed that, even when there was no litigation in question, five out of six patients who had been diagnosed as feigning psychosis were later diagnosed as, in fact, schizophrenic. Hay, *Feigned Psychosis – A Review of the Simulation of Mental Illness*, 143 Brit. J. Psychiatry 8, 10 (1983).

This skepticism toward claims of mental illness and virtual assumption of malingering was forcibly conveyed to the jury in this case. All of the mental health professionals were extensively examined about it, JA 7-8, 22-23, 37, 40-43, 49-50, 52, 55-56, 65-66, and the prosecutor laid great stress on the issue in argument: the prosecutor here rationalized the imposition of the burden of proof on the defendant as necessary, by claiming that otherwise, "every defendant" would claim incompetence and "you wouldn't have any trials occurring." JA 85.[7] In light of the initial production burden, this argument was, of course, highly misleading; but it accurately reflected the atmosphere of suspicion of the claim of incompetence which pervaded the proceeding.

In fact, a tendency to err in favor of finding competency may infect both initial screening evaluations and final expert judgments. Schreiber, Roesch and Golding, *An Evaluation of Procedures for Assessing Competence To Stand Trial*, 15 Bull.Am.Acad. Psychiatry L. 187, 197-198 (1987) (one screening instrument consistently favors finding of competency); R. Roesch and S. Golding, *Competency To Stand Trial*, *supra*, at 182 (study showing one screening instrument incorrectly classified as competent 40% of defendants later found incompetent); *id.* at 160 (estimated 10% of incompetents erroneously classified as competent); Goldstein and Stone, *When Doctors Disagree: Differing Views On Competency*, 5 Am.Acad. Psychiatry L. 90, 95 (1967) (many psychiatrists favor finding competency in close cases); T. Grisso, *Evaluating Competencies* 99 (1986) (one screening test identified as competent 32% of defendants later found to be incompetent).

Since the jury's determination will almost always be dominated by the opinions of mental health experts, *see*,

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[7] This claim is not novel. *See Trial of Charles Bateman*, 11 How. St. Trials at 476. In 1685, however, it was believed that pretended madness would be discovered. *Id.*

e.g., H. Steadman, *Beating A Rap? Defendants Found Incompetent to Stand Trial* 54 (1979) (court agreed with psychiatric evaluation in 92% of cases); Reich and Tookey, *Disagreements Between Court and Psychiatrist on Competency to Stand Trial*, 47 J. Clinical Psychiatry 29, 29 (1986) (91% rate of agreement between court and psychiatric evaluation on issue of competency), this bias is necessarily reflected in the factfinder's decision, thereby increasing the risk of an erroneous finding of competence.

(iv) The Instruction Injecting the Presumption of Competence Into The Jury's Deliberations Irrationally Increases the Risk of An Erroneous Finding

In addition to the other factors increasing the risk of an erroneous determination of competence in this case was the giving of a jury instruction reiterating the presumption of competence. JA 4, 70; CALJIC No. 4.31 (1984 Rev.). By injecting the presumption into the jury's deliberations as evidence in the case, after the defendant had satisfied the burden of producing evidence to rebut the presumption of competence, this instruction independently violated the defendant's right to due process of law. *See* Part II, below. Instructing the jury that a presumption of competence subsists, after the defendant has produced evidence to support the trial court declaration of a doubt as to competence in order to be entitled to a hearing on the issue, is entirely irrational, and it could only have been understood by the jury as increasing the burden of proof imposed on the defendant. This instruction, in addition to the other factors described above, grossly increased the risk of an erroneous determination of competence.

(c) Placing the Burden of Proving Competence Upon the Prosecution Would Significantly Decrease the Likelihood of An Erroneous Result

In light of the pervasive practical bias against claims of incompetence, imposition of the burden of proof on the defendant gratuitously increases the risk of an erroneous result. Because the defendant's right to be tried only if he is competent is a fundamental one, any error should be made in favor of finding incompetence; and placing the burden of proof on the prosecution would increase the likelihood of that occurring. That allocation of the burden of proof would also increase the accuracy of the result: a commitment to a hospital setting (which in California results from a finding of incompetency) may be the only way to arrive ultimately at a reliable determination. In difficult cases, an extended inpatient evaluation, including professional observation, is more likely to resolve the question of competency accurately. Drob, Berger and Weinstein, *Competency To Stand Trial: A Conceptual Model for Its Proper Assessment*, 15 Bull.Am.Acad. Psychiatry L. 85, 93-95 (1987); *see* Miller and Germain, *Inpatient Evaluation of Competency To Stand Trial*, 9 Health L. Canada 74, 75-76 (1989); D. Shapiro, *Psychological Evaluation and Expert Testimony: A Practical Guide To Forensic Work* 12, 14-18 (1984); *see also* Bagby, Gillis and Dickens, *Detection of Dissimulation With The New Generation of Objective Personality Measures*, 8 Behavioral Sci. L. 93, 102 (1990) (administration of extensive test battery to institutionalized subjects detected malingering with 92.5% success rate); Resnick, *The Detection of Malingered Mental Illness*, 2 Behavioral Sci.L. 21, 30 (1984).

Placing the burden of proof upon the state would thus have significant value in mitigating the inherent risk of harm to the defendant's fundamental interest from an erroneous determination of competency. The allocation of the burden of proof is often outcome-determinative in

close cases of all kinds. *See e.g.*, Underwood, *The Thumb On the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1308 (1977); Weihofen, *The Flowering of New Hampshire*, 22 U.Chi.L.Rev. 356, 360 (1955). In competency proceedings, where, in close cases, the jury will normally be faced with contradictory expert testimony, placing the burden of proof upon the prosecution is likely to prevent an erroneous finding of competency. *See United States ex rel. S.E.C. v. Billingsley*, 766 F.2d 1015, 1023 (7th Cir. 1985); *United States ex rel. Bilyew v. Franzen*, 686 F.2d 1238, 1247-1248 (7th Cir. 1982); *cf. Parham v. J.R.*, 442 U.S. 584, 609 (1979) (adversary hearing unlikely to improve accuracy of medical determination).

3. The Impact Upon the State's Interests of the Additional Protection Is Minimal

The third *Mathews* factor is the impact on the state's interests of placing the burden of proof of showing competence upon the prosecution. There is no reason to believe that this impact would be significant, either in terms of monetary cost or in terms of delay of criminal proceedings.

Allocating the burden of proof to the prosecution would have no effect on the initial burden of producing evidence upon the party claiming the defendant's incompetence. No hearing is required unless a "bona fide doubt" (or a "sufficient doubt") of the defendant's competency exists. *Drope v. Missouri, supra*, 420 U.S. at 180; *Pate v. Robinson, supra*, 383 U.S. at 385. Because ["t]here are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," *Drope v. Missouri*, 420 U.S. at 180, the trial court retains significant power to refuse to declare a doubt as to competency.

Existing California procedures do not allow the burden of proof to become relevant until a doubt of the defendant's competency has been raised and a hearing

ordered, and until substantial evidence has been produced that a defendant is incompetent, no hearing is required. *See People v. Mickle*, 54 Cal.3d 140, 184, 814 F.2d 290 (1991) (no doubt as to competence expressed by trial court); *cf. People v. Marks*, 45 Cal.3d 1335, 1340, 756 P.2d 260 (1988). California courts take seriously the initial production burden: trial courts routinely deny requests for competency hearings, and their actions are upheld on appeal. *E.g., People v. Hays*, 54 Cal.App.3d 755, 759, 126 Cal.Rptr.770 (1976) (court not required to hold competency hearing merely upon counsel's statement that defendant is mentally incompetent); *People v. Stewart*, 89 Cal.App.3d 992, 996, 153 Cal.Rptr.242 (1979) (court not required to hold hearing when counsel's opinion as to competence is not substantial in light of two psychiatrists' reports showing no mental abnormality); *see People v. Mickle, supra*, 54 Cal.3d at 184; *see also Maggio v. Fulford*, 462 U.S. 111 (1983) (per curiam) (upholding, as fairly supported by the record, state court's denial of competency hearing).

Federal courts also routinely deny competency hearings when the evidence is insufficient to raise a doubt as to the defendant's capacity to proceed. *E.g., Thompson v. Blackburn*, 776 F.2d 118, 123-124 (5th Cir. 1985); *Sturgis v. Goldsmith*, 796 F.2d 1103, 1109-1110 (9th Cir. 1986); *Fallada v. Dugger*, 819 F.2d 1564, 1568-1569 (11th Cir. 1987). All jurisdictions, including jurisdictions which place the burden of proof of competence on the prosecution, recognize that a substantial initial burden of production must be met before a hearing is ordered. *E.g., People v. Murphy*, 72 Ill.2d 421, 381 N.E.2d 677 (1978); *People v. Doom*, 48 Ill.App.3d 959, 363 N.E.2d 457 (1977); *State v. Weber*, 146 Wis.2d 817, 433 N.W.2d 585 (App. 1988).

In short, no jurisdiction requires competency hearings "on demand." *State v. Janice*, 20 Conn.App.212, 565 A.2d 553, 554 (1989). Accordingly, there is no reason to

suppose that the number of competency claims or competency hearings would increase as a result of the allocation of the burden of proof to the state, and thus the cost of administering the state's criminal justice system would not increase.[8]

There is also no reason to believe that placing the burden of proof on the state would substantially increase the number of contested hearings. As shown above, the

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[8] The scope of any marginal increase in the number of incompetency findings should not be inflated. Commentators have estimated that 25,000 competency evaluations of some sort are conducted annually. *See* Steadman and Hartstone, *Defendants Incompetent To Stand Trial*, in J. Monahan and H. Steadman, eds., *Mentally Disordered Offenders: Perspectives from Law and Social Science* 39, 41 (1983) (estimate based upon 1978 data); *cf.* H. Steadman, *Beating A Rap? Defendants Found Incompetent To Stand Trial* 4 (1979) (estimating 36,000 evaluations annually); Goldstein, *"The Fitness Factory," Part I: The Psychiatrist's Role In Determining Competency*, 130 Am.J.Psychiatry 1144, 1147 n. 2 (1973) (estimated 0.87% of defendants examined for competency in 1973). Of that number, however, the vast majority do not involve disagreements among the examining mental health professionals, or between the mental health professionals and the court. In only about 11% of the referrals is there a need for anything more than a brief screening evaluation, R. Roesch and S. Golding, *Competency To Stand Trial* 186 (1980); Roesch, *Determining Competency To Stand Trial: An Examination of Evaluation Procedures In An Institutional Setting*, 47 J. Consulting and Clinical Psychology 542, 549 (1979); and of those cases, even fewer result in contested hearings. Thus the number of cases in which there is serious disagreement among mental health professionals sufficient to result in a contested hearing, as to a defendant's competence, is extremely small. *See* Schreiber, Roesch and Golding, *An Evaluation of Procedures for Assessing Competence To Stand Trial*, 15 Bull.Am.Acad. Psychiatry L. 187, 197-198 (1987); Bluestone and Melella, *A Study of Criminal Defendants Referred for Competency To Stand Trial in New York City*, 7 Bull.Am.Acad. Psychiatry L. 166, 172 (1979).

outcomes of competency proceedings are overwhelmingly dominated by the evaluations of the psychiatric experts. In turn, those experts agree among themselves on the issue of competency in the vast majority of cases. *See* Goldstein and Stone, *When Doctors Disagree: Differing Views on Competency*, 5 Bull. Am. Acad. Psychiatry and Law 90, 91 (1967) (study showing 2.5% rate of disagreement between psychiatrists); Golding, Roesch and Schreiber, *Assessment and Conceptualization of Competency to Stand Trial*, 8 Law and Human Behavior 321, 328 (1984) (study showing 97% agreement among interviewers); Schreiber, *Professional Judgment in the Assessment of Competency to Stand Trial: Report of An Evaluation Study*, 5 Intl. J.L. Psychiatry 331, 339 (1982) (two cases out of 52 of irreconcilable disagreement among evaluators, including lawyers and mental health professionals); Johnson, Nicholson and Service, *The Relationship of Competency to Stand Trial and Criminal Responsibility*, 17 Crim. Justice and Behavior 169, 176 (1990) (.8% disagreement among mental health professionals in study), Poythress and Stock, *Competency To Stand Trial: A Historical Review and Some New Data*, 8 J. Psychiatry L. 131, 138, 140 (1980). Thus the state arguably would not incur any additional costs except in the very few cases, like petitioner's, where the assessment of competency is a difficult one.

Nor is there reason to anticipate an additional burden to the state in preparing for and shouldering the burden of proof in cases that do require a contested hearing. Most competency hearings, even contested ones, are extremely summary, often involving nothing more than submission of the expert's reports. *See* H. Steadman, *Beating A Rap? Defendants Found Incompetent to Stand Trial* 46-47 (1979). Even when a more elaborate hearing is required, as it was in this case, the cost to the state of preparing for it would be substantially the same regardless of which party has the burden of proof. Here, the prosecutor presented testimony showing the defendant's

behavior in jail; elicited opinions from the experts on their diagnoses, on the issue of malingering, and on the ultimate issue of competence and probed the information on which their opinions were based; and elicited information from members of the defendant's family. There appears to be little more that the prosecutor could have done in the hearing if he had borne the burden of proof.

Nor would obtaining the relevant evidence pose an undue burden. The primary evidence in the competency proceeding, the expert evaluations based on examination of the defendant, are equally available to both parties, *Buchanan v. Kentucky*, 483 U.S. 402, 424-425 (1987); Cal. Evid. Code § 1017, as are the other materials relied upon by the experts. Cal. Evid. Code §§ 802, 804. When the defendant is in custody, the state has an ability to obtain evidence of his behavior which is superior to that of the defense. Here, the prosecutor presented extensive evidence of the defendant's violent behavior through Sergeant Green's records, a jail mental health worker, Mr. Miller, was able to observe the defendant's behavior closely over a period of three weeks, and the defendant was under constant observation when he was in the "rubber room" in the jail. JA 57-58; RT 227-228; *see People v. Mickle*, 54 Cal.3d at 162 (testimony of jailer as to defendant's conduct over previous year); Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 U.C.L.A. L.Rev. 637, 654 (1978). The prosecutor may even obtain evidence about the defendant's behavior and demeanor from defense counsel. *See Darrow v. Gunn*, 594 F.2d 767, 774 (9th Cir. 1979).[9] In short, allocating the burden of proof to the state would not result in undue costs in connection with preparing for or conducting the hearing itself.

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[9] The question whether evidence of otherwise privileged attorney-client communications may be obtained by the state in a competency proceeding is apparently an open one in California. *People v. Mickle*, 54 Cal.3d at 182-184; *cf. United States ex rel. S.E.C. v. Billingsley, supra*, 766 F.2d at 1027-1028.

The monetary costs of an incompetency commitment would also not be substantial. In cases where the competency issue is a difficult one, allocation of the burden of proof to the prosecution may result in a finding of incompetency and a commitment to a psychiatric facility, which in turn may result in some marginal cost to the state.[10] *See* Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits and A Proposal for Reform*, 39 Rutgers L.Rev. 243, 249-250 (1987). The cost of the commitment, however, is likely to be slight, due to the brief duration of most commitments; and the gain in the accuracy of the determination is substantial. Under these circumstances, "[w]here the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (footnote omitted).

Finally, an incompetency commitment may result in some delay of the criminal proceedings. The state does have an interest in prosecuting criminal actions without undue delay, but a finding of incompetence results in a minimal interference with that interest. A study conducted by the leading authorities in this field disclosed that defendants who were in fact competent and were committed to an inpatient hospital facility for determination of competency were returned to court for trial in an average of 43 days. R. Roesch and S. Golding, *Competency To Stand Trial* 149 (1980). Another study involving a smaller sample established that competent defendants were identified and returned to court in a mean period of 17 days. *Id.* at 178; Geller and Lister, *The Process of Criminal Commitment for Pretrial Psychiatric Examinations: An*

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[10] When the defendant is being held in a high-security or medical area in a county jail, as petitioner was, this marginal cost should be minimal.

Evaluation, 135 Am.J. Psychiatry 53 (1978) (most defendants returned to court "immediately").[11] These studies indicate that the consequences of an erroneous finding of incompetency will not involve undue delay of the criminal proceedings. This minimal delay cannot be considered significant by comparison with the benefit of an adequate opportunity to evaluate the defendant: when a delay is necessary to protect the fairness of the ensuing

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[11] Defendants currently found incompetent to stand trial in California and committed to Atascadero State Hospital are treated and returned to court as competent in an average of a little over three months. Pendelton, *Treatment of Persons Found Incompetent to Stand Trial*, 137 Am. J. Psychiatry 1098, 1100 (1980); Laczko, James and Alltop, *A Study of Four Hundred and Thirty-Five Court Referred Cases*, 15 J. Forensic Sci. 311, 321 (1970) (over 71% of patients hospitalized for competency evaluations returned to court in three months or less); Bennett and Kish, *Incompetency to Stand Trial: Treatment Unaffected by Demographic Variables*, 35 J. Forensic Sciences 403, 408 (1990) (mean length of treatment 5.5 months for defendants committed as incompetent); *see also* Laboratory of Community Psychiatry, Harvard Medical School, *Competency to Stand Trial and Mental Illness* 65 (1973).

Some of the older studies, indicating much longer average duration of commitment upon findings of incompetency reflect abusive practices which are now obsolete. This Court's decision in *Jackson v. Indiana*, 406 U.S. 715 (1972) ended the constitutional acceptance of indefinite commitments of defendants who were merely charged with criminal offenses; and *Lynch v. Overholser*, 369 U.S. 705 (1962), made clear that commitments in criminal cases could not be used as a substitute for civil commitments. Recent evidence suggests that these decisions have significantly diminished the use of incompetency commitments to "warehouse" criminal defendants indefinitely or to deal with matters which cannot be resolved through the normal criminal or civil process. Lamb, *Incompetence To Stand Trial – Appropriateness And Outcome*, 44 Arch.Gen.Psychiatry 754, 756 (1987)

proceedings, "myopic insistence upon expeditiousness . . . can render the right to defend with counsel an empty formality." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (citation omitted); *see Cruzan v. Director, Missouri Health Dept., supra*, 111 L.Ed.2d at 245 (erroneous decision not to withdraw life support maintains status quo).

The minor cost and temporary delay in the proceedings which result from an erroneous finding of incompetency can be contrasted with the invasion of the state's interest resulting from an erroneous finding of insanity as an affirmative defense. An erroneous finding of insanity results in complete exculpation; and in light of the irreversibility of the consequences to the state's legitimate interest, a state constitutionally could "conclude that a defendant who sought to establish the defense of insanity, and thereby escape any punishment whatever for a heinous crime, should bear the laboring oar on such an issue." *Mullaney v. Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring); *Patterson v. New York*, 432 U.S. 197, 207-210 (1977); *see also Cruzan v. Director, Missouri Health Dept., supra*, 111 L.Ed.2d at 245 (irreversibility of impact on party's interest); *Santosky v. Kramer, supra*, 455 U.S. at 759 (same). Thus the state's interests would not be unduly compromised by placing the burden of proving the defendant's competence upon the prosecution.

4. Conclusion

Balancing the relevant factors under the due process of *Mathews v. Eldridge* reveals that the defendant's interest affected by the imposition of the burden of proof is fundamental; the risk of error is substantial, and the allocation of the burden of proof to the state would, in close cases, prevent deprivation of the right; the impact on the state's interests is minimal. The ultimate "societal judgment about how the risk of error should be distributed between the litigants", *Santosky v. Kramer, supra*, 455 U.S. at 755, is clear in this situation: the injury to a

defendant's interests from an erroneous finding of competence is significantly greater than the injury to the state from an erroneous finding of incompetence; and the risk of error is high. Accordingly, imposition upon the defendant of the burden of proving incompetence violates due process under the *Mathews v. Eldridge* test.

B. Imposing the Burden of Proving Incompetence Upon the Defendant Is Historically Unjustified, Not Widely Accepted, And Based Upon Analytical Confusion

Petitioner has shown that imposing the burden of proving incompetence upon the defendant violates the test of due process enunciated in *Mathews v. Eldridge*. Other considerations relevant to the due process analysis support the same result.

In determining whether imposing the burden of proof upon the defendant "offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental", *Speiser v. Randall*, 357 U.S. 513, 523 (1958), it is appropriate to examine the historical context of the rule, as well as its current status in the states. *See Addington v. Texas*, 441 U.S. 418, 431-432 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 692-696 (1975); *Leland v. Oregon*, 343 U.S. 790, 796-797 (1953). This analysis reveals that the historical pedigree of the rule is as questionable as the analytical justifications advanced for it; and that the rule does not command wide support among the states.

The common law rule on this issue at the time the Constitution was adopted is not entirely clear, but the rule which can be derived from analogous cases supports petitioner's position. The common law courts treated individuals who were deaf and mute, and therefore incapable of understanding or communicating, as essentially equivalent to those similarly incapacitated as a result of mental disability. *E.g.*, 1 W. Blackstone, *Commentaries*, *

293-294 (1765).[12] For instance, a defendant who was incapable of understanding or communicating because she was deaf and mute was found unfit to stand trial as "insane," under the statute providing for detention of defendants who were mentally incompetent to stand trial. *Dyson's Case*, 1 Lewin. 64, 65-66, 168 Eng.R. 960, 961 (1831); *accord*, *Rex v. Pritchard*, 7 Car. & P. 303, 304-305, 173 Eng.R. 135 (1836).

When such a defendant stood mute at arraignment, and it was determined that the defendant was "mute by the visitation of God" – that is, was not merely refusing to plead – there arose "a presumption of ideotism" which the prosecution was required to rebut. *The King v. Steel*, 1 Leach 451, 168 Eng.R. 328 (1787). Thus immediately before the Constitution was adopted, the English practice placed the burden of proof of capacity to plead on the prosecution.

The rule that the prosecution was required to establish the defendant's fitness to plead was explicitly applied to the question of mental competency in *Ley's Case*, 1 Lewin. 239, 168 Eng. Rpts. 1026 (1828), and that rule was observed without criticism into the twentieth century. *R. v. Sharp*, [1958] 1 All Eng. Rpts. 62; *R. v. Davies*, 3 Car.& K. 328, 329, 175 Eng.R. 575 (1853) (on inquiry into competence, question is whether defendant is "in a fit state to plead" which "lies on the prosecution to make out"); *cf. R. v. Turton*, 6 Cox C.C. 385 (1854) (burden of production on party claiming unfitness to plead due to insanity). Only in 1959 was the rule requiring an affirmative showing of competency to stand trial replaced by a

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[12] The ability to communicate was always the sine qua non of capacity to proceed. In the ninth century, a father was required to pay compensation for the misdeeds of a son born deaf and mute, who could "neither deny nor confess his wrongdoings." Laws of Alfred § 14, in F. Attenborough, ed. and trans., *Laws of the Earliest English Kings* 71 (1922).

rule requiring a showing of incompetency and placing the burden of proof on the party raising the issue. *R. v. Podola*, 1 Q.B. 325, [1959] 3 All Eng.Rpts. 418, appeal dismissed [1959] 3 All Eng.Rpts. 426 (Crim. App.). The trial court in *Podola* confused the burden of proof of insanity as a defense and the burden of showing competency to stand trial, *id.* at 419; and the *Podola* rule has been criticized in its own country for requiring the defendant to go to trial when the evidence of competence is in equipoise: "a man may be convicted although a jury was not satisfied that he was capable of making out a proper defense at his trial." J. Smith and B. Hogan, *Criminal Law* 161 (4th ed. 1978); *see also* Dean, *Fitness To Plead* [1960] Crim.L.Rev. 79, 82.

Thus the rule imposing the burden of proof of incompetency upon the defendant does not come before the court with impressive historical support. This is in sharp contrast to the historical acceptance under the common law and among American jurisdictions of placing the burden of proving the affirmative defense of insanity upon the defendant. *Leland v. Oregon*, 343 U.S. 790, 798 (1952).

The rule imposing the burden of proving incompetence on the defendant also does not enjoy wide acceptance among American jurisdictions. Twenty-three jurisdictions do not impose a burden on the defendant, or specify the degree of proof, by statute or by decisional law.[13] One state imposes the burden of proving competence upon the prosecution, by proof beyond a reasonable

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[13] Ala. Code § 15-16-21 (Michie 1986); Ariz. R. Cr. Pro., Rule 11.1 (West 1987); D.C. Code Ann. § 24-301 (Michie 1989); Haw. Rev. Stat. § 704-405 (1985); Idaho Code § 18-212 (1987); Ind. Code Ann. § 35-36-3-1 (West 1986); Kan. Stat. Ann. § 22-3302 (1988); Ky. Rev. Stats. Ann. §§ 504.100(3) (Michie 1990); Me. Rev. Stat. Ann. tit. 15 § 101-B (West Supp. 1990); Mich. Comp. Laws Ann. § 330.2020 (West 1980); Miss. Code

(Continued on following page)

doubt.[14] One state requires competency to be proved by clear and convincing evidence and places the burden on the prosecution if the defendant claims incompetency.[15] One state imposes the burden of proving competency on the prosecution by a preponderance by statute,[16] and eight states adopt the same rule by decisional law.[17] One state requires proof of competence by a preponderance but does not allocate the burden of proof.[18]

Three states require proof of incompetence by a preponderance, but do not allocate the burden between the parties.[19] Two states require proof of incompetence by a

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Ann. § 99-13-11 (1972); Mo. Rev. Stat. § 552.020(7) (Vernon 1987); Mont. Code Ann. § 46-14-221 (1989); Neb. Rev. Stat. Ann. § 29-1823 (1989); Nev. Rev. Stat. Ann. § 178.415 (Michie 1986); N.J. Stat. Ann. § 2C:4-6 (West 1982); N.C. Gen. Stat. § 15A-1002 (1988); Or. Rev. Stat. § 161.370 (1990); R.I. Gen. Laws § 40.1-5.3-3(e) (Michie 1990); S.C. Code Ann. § 44-23-430 (Law.Co.Op. 1976); Tenn. Code Ann. § 33-7-301 (Michie 1984); Utah Code Ann. § 77-15-5 (1990); Vt. Stat. Ann. tit. 13 § 4817(b) (1974).

[14] *Treece v. State*, 313 Md. 665, 547 A.2d 1054, 1063 (1988).

[15] Wis. Stat. Ann. § 971.14(4) (West Supp. 1990).

[16] Ill. Rev. Stat., ch. 38, ¶ 104-11(c) (Smith-Hurd 1977).

[17] *McCarlo v. State*, 677 P.2d 1268, 1271-1272 (Alaska App. 1984); *Diaz v. State*, 508 A.2d 861, 863-864 (Del. Super. 1986); *Comm. v. Crowley*, 393 Mass. 393, 471 N.E.2d 353, 357-359 (1984); *State v. Bertrand*, 123 N.H. 719, 465 A.2d 912 (1983); *People v. Santos*, 43 App.Div.2d 73, 349 N.Y.S.2d 439, 442 (1973); *State v. Heger*, 326 N.W.2d 855, 858 (N.D. 1982); *State v. Jones*, 406 N.W.2d 366, 370 (S.D. 1987); *Loomer v. State*, 768 P.2d 1042, 1045 (Wyo. 1989).

[18] Minn. R. Crim. Pro., Rule 20.01, subd. 3(6) (West Supp. 1991).

[19] W.Va. Code Ann. § 27-6A(d) (Michie 1986); Wash. Rev. Code Ann. ch. 10.77.090(2) (West 1990); Ohio Rev. Code Ann. § 2945.37(A) (Anderson Supp. 1990).

preponderance and place the burden on the party asserting incompetence.[20] One state imposes the burden upon the defendant but does not specify a standard of proof.[21] Two states require proof of incompetence by clear and convincing evidence and place the burden on the party claiming incompetence.[22] One state places the burden of proof of incompetence by clear and convincing evidence on the defendant.[23] Finally, six states impose the burden of proof of incompetence by a preponderance upon the defendant by decisional law[24] and one – California – imposes the same burden by statute.[25] Thus there is no consensus among American jurisdictions on this issue which would provide clear support for imposing the burden of proof of incompetence upon the defendant.

The number of jurisdictions which adopt or reject the rule imposing the burden of proof on the defendant is, of course, not determinative of the issues: a mere "head count" of jurisdictions cannot substitute for a "considered evaluation or the merits of [the] constitutional claim." *People v. Medina, supra,* 51 Cal.3d at 916 (1990) (Broussard, J., dissenting); JA 151. The major source of error in

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[20] Colo. Rev. Stat. Ann. § 16-8-111(2) (West 1986); Va. Code. Ann. § 19.2-169.1E (Michie 1990).

[21] *Deason v. State,* 263 Ark. 56, 562 S.W.2d 79, 81, cert. denied, 439 U.S. 839 (1978).

[22] Conn. Gen. Stat. § 54-56d(b) (West 1989); Pa. Stat. Ann. tit. 50 § 7403(a) (Purdon 1969 and Supp. 1991).

[23] *Miller v. State,* 751 P.2d 773 (Okla.Crim. 1988).

[24] *Flowers v. State,* 353 So.2d 1259, 1260 (Fla.App. 1978); *Wallace v. State,* 248 Ga. 255, 282 S.E.2d 325, 330, cert. denied 453 U.S. 927 (1981); *State v. Pedersen,* 309 N.W.2d 490, 496 (Iowa 1981); *State v. Rogers,* 419 So.2d 840, 843 (La. 1982); *State v. Chapman,* 104 N.M. 324, 721 P.2d 392, 395 (1986); *Barber v. State,* 757 S.W.2d 359, 363 (Tex.Crim. 1988), cert. denied 489 U.S. 1091 (1989).

[25] Cal. Pen. Code § 369(f) (West 1982).

analyzing the merits of petitioner's claim is the confusion of the issue of present competence with insanity at the time of the offense. In *Jackson v. Indiana,* 406 U.S. 715, 739 (1972), this Court explicitly recognized that the two issues are quite separate: a defendant's "criminal responsibility at the time of the alleged offenses . . . is a distinct issue from his competency to stand trial." The authorities which support petitioner's position respect this distinction, but the contrary cases, such as the decision of the California Supreme Court here, ignore it. Not only does this confusion pervade the caselaw, it also underlies the statutory provision at issue.

The Supreme Court of New Hampshire, avoiding the trap into which the California Supreme Court fell in this case, recognized in *State v. Bertrand,* 123 N.H. 719, 465 A.2d 912, 916 (1983), that there is "no inconsistency" in applying a different burden of proof to the defense of insanity than to the issue of competence: determining a defendant's mental state at a time in the past presents different issues from litigating his present mental state.

In *People v. Bender,* 20 Ill.2d 45, 169 N.E.2d 328, 332 (1960), the Illinois Supreme Court focussed appropriately upon the defendant's questionable mental condition at the present time, which compromised his ability effectively to litigate that issue in the current proceeding. Under those circumstances, the burden of proof could not be placed upon him. In *People v. McCullum,* 66 Ill.2d 306, 362 N.E.2d 307, 310-311 (1977), the court cast that insight specifically in due process terms, relying on *Speiser v. Randall,* 357 U.S. 513, 523 (1958). This position is entirely consistent with this Court's refusal, in *Pate v. Robinson,* 383 U.S. at 384, to apply a waiver rule against a defendant who was arguably incompetent at the time of the supposed waiver.

In *United States v. DiGilio,* 538 F.2d 972, the court accurately assessed the comparative risk of harm under the due process clause:

> "Allocation of the burden of proof will be significant, in theory at least, only in the rare case when, assuming the evidence is weighed by the preponderance of evidence standard, the conflicting evidence is in equipoise in the mind of the fact finder. At that point the triability of a defendant will depend on where the burden of proof is placed. To put the question another way, what we are determining is a rule of law, of due process dimensions, that a defendant about whom the evidence of competency to stand trial is in equipoise, should or should not be tried. If, as the Court has made clear, the concept of competency to stand trial is grounded in notions of fundamental fairness in the operation of the judicial process, . . . the question can only be answered in the negative. Evidence showing competency must be more persuasive than that showing incompetency. Of necessity, then, there is no room for a rule of law placing any burden of proof on the defendant."

Id. at 986-987; *see also State v. Jones*, 406 N.W.2d 366, 370 (S.D. 1987) ("great injustice" if an incompetent person forced to stand trial); Pizzi, *Competency To Stand Trial in Federal Courts, supra*, 45 U.Chi.L.Rev. at 65-66. This analysis is strikingly similar to the language relating to the permissible allocation of the risk of error in Justice Harlan's opinion in *In re Winship*, 397 U.S. 358, 370-374 (1970) (Harlan, J., concurring).

By contrast, the caselaw which was relied upon by the California Supreme Court in this case is entirely unpersuasive: it adheres doggedly to the confusion of competence with the defense of insanity. In *State v. Aumann*, 265 N.W.2d 316, 319-320 (Iowa 1978), the court was not confronted with a due process challenge under the federal constitution, because counsel had explicitly withdrawn such a challenge in light of this Court's dismissal, for want of a substantial federal question, of an appeal from *Rivera v. State*, 351 A.2d 561 (Del.), appeal dismissed 429 U.S. 877 (1976). The court in Aumann

disposed of the due process claim under the state constitution in reliance upon the reasoning of *Leland v. Oregon*, 343 U.S. 790 (1952) – that is, upon an analysis relevant to the burden of proof of affirmative defenses existing at the time of the offense – which, again, is substantially different from analysis of the issue of current competence. Thus the Aumann decision rests upon the perennial but analytically unsound confusion between present competence and competence at the time of the offense. *See* Note, *Should the Burden of Proving Incompetence Rest on the Incompetent?* 64 Iowa L.Rev. 984, 996-998 (1979).

In *State v. Chapman*, 104 N.M. 324, 721 P.2d 392, 395 (1986), the court rejected a due process argument solely on the basis of a previous case, *State v. Ortega*, 77 N.M. 7, 419 P.2d 219, 228 (1966). *Ortega*, in turn, relied upon the practice in California, although the case cited for the rule, *People v. Lawson*, 178 Cal. 722, 727, 174 P. 885 (1918), simply refers to the "well-settled rule in this state" without any analysis of it. *Ortega* also relied on a text stating that placing the burden of proof on the defendant was the accepted rule. 419 P.2d at 228, citing H. Weihofen, *Mental Disorder As A Criminal Defense* 434 (1954). None of the cases cited by the text in support of this proposition, *id.* at 434 n. 25, contains any constitutional analysis of the question, or identifies any source for the rule other than its equation with the defense of insanity.

In *Wallace v. State*, 248 Ga. 255, 282 S.Ed.2d 325, 330 (1981), the court rejected the constitutional challenge, as in *State v. Aumann*, by confusing the question of present competency with that of insanity at the time of the offense as an affirmative defense. The whole of the court's "analysis" of the issue was:

> "The constitutionality of placing the burden of proving insanity upon the defendant has been recognized by this Court and by the Supreme Court of the United States. *Durden v. State*, 239 Ga. 697 [238 S.E.2d 334] (1977); *Patterson v. New*

York, 432 U.S. 197 [97 S.C. 2319, 53 L.Ed.2d 281] (1977)."

Finally, in *Lowenfield v. Phelps*, 817 F.2d 285 (5th Cir. 1987), affirmed on other grounds 484 U.S. 231 (1988), the court's discussion of the issue was dictum: it found that any error with respect to the allocation of the burden of proof was harmless because the expert testimony was uniformly that the defendant did not have any mental disease or defect resulting in incompetency. *Id.* at 295. On the merits, despite its condescension toward caselaw adopting petitioner's position, the *Lowenfield* decision offered absolutely nothing by way of due process analysis of the issue, beyond relying upon *Leland*. The decision asserts merely that "[w]e see no reason why Louisiana should be prohibited from placing the burden of proving incompetency on the defendant. . . . " *Lowenfield v. Phelps, supra*, 817 F.2d at 294.[26] Nothing in these cases suggests a reasoned basis for rejecting the due process analysis relied upon by petitioner.

The California statute at issue here suffers from the same confusion which infects these cases. The Legislature adopted the term "incompetence" deliberately, in order to avoid confusion with the defense of insanity at the time of the offense. Parker, *California's New Scheme for the Commitment of Individuals Found Incompetent To Stand Trial*, 6 Pacific L.J. 484, 484 n. 3 (1975). At the same time, however, it adopted the burden of proof provisions as a reflection of the rule imposed by California caselaw, which was based upon that very confusion.

In the legislative history of the provision, the language imposing the burden of proof is described as a "nonsubstantive change," thus suggesting that the legislature believed it was merely codifying the decisional law. Assembly Committee on Criminal Justice, *Bill Digest*,

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[26] One federal case follows *Lowenfield* without any independent analysis of the issue. *Wallace v. Kemp*, 581 F.Supp. 1471, 1478 (M.D. Ga. 1984), rev'd on other grounds 757 F.2d 1102 (11th Cir. 1985).

AB 1529 at 1 (1973). But the cases referred to in support of the presumption of mental competency and burden of proof included in the bill, *see* Parker and Hayes, *Mental Incompetence To Stand Trial – California's Answer* (Analysis of AB 1529 by the California Attorney General) 15 (1974), in fact restate the same erroneous equation of insanity as a defense and competence at the time of the trial: "although the tests to determine capacity are different . . . the burden of proof is on the defendant to establish his insanity on each of these issues." *People v. Vaughn*, 262 Cal.App.2d 42, 55, 68 Cal.Rptr. 366 (1968); *People v. Glover*, 257 Cal.App.2d 502, 512, 65 Cal.Rptr. 8 (1967) (discussing only insanity at time of crime as defense). The statute under review here thus merely incorporates the historical confusion between competence at the time of trial and sanity at the time of the offense.

C. Conclusion

As shown above, the rule imposing the burden of proof of incompetency upon the defendant cannot survive due process analysis, and neither its historical pedigree, nor its acceptance among the states, otherwise recommends it. Accordingly the judgment of the California Supreme Court, rejecting petitioner's challenge to the rule, must be reversed.

II

THE JURY INSTRUCTION IMPOSING A PRESUMPTION OF COMPETENCE, AFTER THE TRIAL COURT HAD DECLARED A DOUBT AS TO THE DEFENDANT'S COMPETENCE AND EVIDENCE IN SUPPORT OF INCOMPETENCE HAD BEEN PRESENTED, INJECTED AN IRRATIONAL ELEMENT INTO THE JURY'S DELIBERATIONS IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW

At the close of the competency proceeding, the court instructed in the terms of CALJIC No. 4.10 (1984 Rev.), which told the jury that "[t]he defendant is presumed to

be mentally competent. . . . " JA 87; CT 419. This instruction injected an irrational and arbitrary presumption as evidence into the jury's deliberations, which skewed the assessment of the defendant's competence in violation of the due process guarantee of the Fourteenth Amendment.

Petitioner does not contend that the presumption of competency is irrational or otherwise improper to the extent that it imposes a burden of production upon any party initially claiming that a defendant is not presently competent. Once evidence of incompetence has been produced, however, and particularly once the trial court has formally declared a doubt as to the defendant's competence, the presumption cannot rationally survive in the proceedings to determine that issue. *See* Allen, *Presumptions in Civil Actions Reconsidered*, 66 Iowa L.Rev. 843, 856-859 (1981); Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 U.C.L.A. L.Rev. 637, 695-698 (1978).[27]

This Court has consistently recognized that a "presumption is not evidence and may not be given weight as evidence. [Citations.]" *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 171 (1938); *Mobile J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910); *The Wildcroft*, 201 U.S. 378, 388 (1906); *Lincoln v. French*, 105 U.S. 614 (1882); *accord, United States v. Hendrix*, 542 F.2d 879, 882 (2d Cir. 1976); *Alpine*

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[27] Since it is the evidentiary use of the presumption which is in issue rather than any burden-shifting function it may perform, some questions normally associated with analysis of presumptions do not arise. Whether the competency proceeding is a civil or a criminal one, *see, e.g., Hicks v. Feiock*, 485 U.S. 624, 631-641 (1988), and whether the presumption could have been understood by a juror as a mandatory or permissive one, *see, e.g., Ulster County v. Allen*, 442 U.S. 140, 156-162 (1979), are not directly involved. What is involved is the basic requirement of the due process clause that any state-imposed evidentiary rule be rational; and the evidentiary use of the presumption of competence in this context is not rational.

Forwarding Co. v. Pennsylvania R. Co., 60 F.2d 734, 736 (2d Cir. 1932) (per L. Hand., J.) ("If the trial is conducted properly, the presumption will not be mentioned at all. . . . "); 9 J. Wigmore, *Evidence*, § 2511 at 533 (Chadbourn Rev. 1981) ["no presumption can *be* evidence"]; J. Thayer, *A Preliminary Treatise On Evidence at the Common Law* 337 (1898).

Even the most powerful of constitutional presumptions, the presumption of innocence, is not evidence. *Taylor v. Kentucky*, 436 U.S. 478, 483 n. 12. In *Taylor*, this Court acknowledged that the presumption of innocence in a criminal action is not technically a presumption but a restatement of the prosecution's burden of proving the defendant's guilt beyond a reasonable doubt. 436 U.S. at 483-486. *Taylor* held, however, that on request a jury should be instructed on the presumption of innocence, in addition to proper instructions on the prosecution's burden of proof, because of its "salutary effect upon lay jurors." *Id.* at 484. Because of "the suspicion that arises from the arrest, the indictment and the arraignment" *Id.* at 485, quoting 9 J. Wigmore, *Evidence*, § 2511 at 407, the jury may in fact find it difficult to disregard those circumstances and to restrict its determination of the defendant's "guilt or innocence . . . solely on the basis of the evidence introduced at trial . . . . " *Id.* Thus, "the ordinary citizen may well draw significant additional guidance from an instruction on the presumption of innocence." *Id.* at 484.

In petitioner's case, unfortunately, the "significant additional guidance" provided to the jury by the instruction on the presumption of competence was irrational. Under California law, the court's institution of proceedings under section 1368 implies a "prima facie" showing of the defendant's incompetence. *People v. Samuel*, 29 Cal.3d 489, 495-496, 629 P.2d 485 (1981); *Shephard v. Superior Court*, 180 Cal.App.3d 23, 30, 225 Cal.Rptr. 328 (1986).

In the course of the section 1368 proceedings, the defendant's right to make decisions normally reserved exclusively to a competent party is severely restricted on the ground that such decisions cannot be committed to the apparently incompetent defendant's "defective judgment." *People v. Samuel*, 29 Cal.3d at 496. In short, the evidentiary presumption contained in the jury instruction is not merely "strained," *see Tot v. United States*, 319 U.S. 463, 468 (1942), it is perverse, based upon the state's actual treatment of the defendant in the competency proceeding. In addition, the California statute explicitly providing that a presumption is not evidence, Cal. Evid. Code § 600, subd. (a), highlights the irrationality of the instruction here.[28]

The due process clause prohibits the use of presumptions which are arbitrary and irrational. *E.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28-30 (1976); *see Manley v. Georgia*, 279 U.S. 1, 6-7 (1929). The evidentiary use of the presumption of competency in the proceeding to determine that issue is precisely such an arbitrary and irrational use. The situation presented here is functionally

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[28] The California statute was adopted to overturn decisional law allowing the evidentiary use of presumptions.

> "[T]he doctrine that a presumption is evidence imposes upon the party with the burden of proof a much higher burden of proof than is warranted. . . . To require some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly weights the scales of justice against the party with the burden of proof."

Assembly Committee Comment, 1965 Cal. Stats. ch. 299, in Cal.Evid. Code 45 (Parker 1991). In adopting the statute, the legislature followed the views of the most eminent California jurist who had criticized the use of presumptions as evidence. *Id.; Scott v. Burke*, 39 Cal.2d 388, 405-406, 247 P.2d 313 (1952) (Traynor, J., dissenting.)

indistinguishable from that presented in *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639 (1929). There, a state statute provided that when a death occurred in a railroad collision, the railroad was presumed to be negligent. The plaintiff proved the death of the victim and alleged the railroad's negligence, but the railroad produced evidence tending to show that its agents had not, in fact, been negligent. The trial court nevertheless instructed the jury that the railroad was presumed to be negligent. *Id.* at 640-641. This Court held that, in light of the railroad's production of evidence contrary to the presumption, the instruction injecting the presumption into the jury's deliberations – giving it the "effect of evidence to be weighed against opposing testimony" – was irrational and arbitrary and therefore constitutionally impermissible. *Id.* at 642-644.

Here, not only was the instruction on the presumption irrational, it was phrased in language that a reasonable juror would have understood as imposing a mandatory presumption on the ultimate issue. *See Francis v. Franklin*, 471 U.S. 307, 315-316 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 516-517 (1979). The force of such an instruction is sufficiently powerful to effect an unconstitutional shifting of the burden of proof, *id.*; and, like all improper instructions or comments on the evidence emanating from the trial judge, it is likely to have a significantly deforming effect upon the jury's deliberations. *See, e.g., Griffin v. California*, 380 U.S. 609, 614-615 (1965) (effect of judicial comment on defendant's silence at trial). The effect of the instruction in this case, which presented a close question on the issue of competence, can only have been to encourage the jury to view the burden of proof imposed on the defendant as being even greater than the preponderance of evidence required by the remainder of the instruction.

As petitioner has shown, imposition of the burden of proof upon the defendant is impermissible under the due

process guarantee of the Fourteenth Amendment. But however the burden may be allocated, the injection into the jury's deliberations of a presumption which is irrational in the context of the competency hearing cannot constitutionally be justified, nor did the decision of the California Supreme Court under review purport to justify it. Accordingly, the judgment should be reversed.

CONCLUSION

Petitioner submits that the judgment of the Supreme Court of California should be reversed.

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